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# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-1262**

GENERAL MOTORS CORPORATION, et al., *Petitioners*,

v.

DOUGLAS M. COSTLE, Administrator of the Environmental Protection Agency, ENVIRONMENTAL PROTECTION AGENCY, and STATE OF CALIFORNIA, *Respondents*.

## Reply To Federal Respondents And Supplemental Brief In Support Of Petition For A Writ Of Certiorari

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## Reply To Federal Respondents And Supplemental Brief In Support Of Petition For A Writ Of Certiorari

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The brief in opposition of the federal respondents (Opp. Br.) attempts to obscure them, but the issues in this case are important questions of first impression and of national significance, involving the proper interpretation of Section 209(b) of the Clean Air Act, the constitutional rights of automakers to disseminate—and consumers to receive—information, and the duty of the court below to interpret Section 209(b) without slavish deference to the erroneous statutory interpretations of the EPA Administrator. The case highlights the pressing need for this Court to insist that reviewing courts require administrative agencies

to consider and weigh the effects of their regulations on affected statutory and constitutional policies, instead of obliviously pursuing the single-purpose mission that is at the core of their statutory responsibilities. Pursuant to Rule 24(4)-(5) of this Court, petitioners submit this brief to address arguments first raised in the brief in opposition, and petitioners Motor and Equipment Manufacturers Association and Automotive Service Industry Association call to the Court's attention supplemental matters not available when the petition was filed.

**I. Respondents Erroneously Defend the Lower Court's Extraordinary Deference to the Statutory Interpretations by Which the Administrator Has Abdicated His Responsibility to Protect Air Quality.**

The court below adopted an extraordinarily sweeping standard of deference to the statutory interpretations of the Administrator, a standard the federal respondents can defend only by cobbling together, out of their separate contexts, considerably narrower standards announced by this Court. Opp. Br. at 17-18.[1] It is only by such an expedient that respondents could hope to defend the statutory holding below that the Administrator may "sit back, 'like an umpire, and

[1] The court below stated: "For us to conclude that the Administrator misconstrued section 209 petitioners must show *by clear and convincing evidence* that [the Administrator's] construction [of the statutory language] is *unreasonable.*" Slip op., App. at 17a (emphasis added). Respondents can defend this holding only by citing *in combination* the *alternative* standards of deference announced in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975) (courts to defer to "sufficiently reasonable" agency interpretation) and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969) (courts to defer to agency interpretation absent "compelling indications it is wrong").



[merely] resolve adversary contentions.'" Slip op., App. at 55a n.56.

In demonstrating that Section 209(b) charges the Administrator affirmatively to represent and protect the federal statutory interest in air quality, petitioners cited H.R. Rep. No. 728, 90th Cong., 1st Sess. 96 (1967) (emphasis added):

> "[Under Section 209(b) t]he burden would be on *the* [*Administrator*] to show why California . . . should not be allowed to go beyond the Federal limitations in adopting and enforcing its own standards."

The federal respondents contend that "the discussion in the House Report . . . accompanied a proposal which ultimately was *rejected* in favor of the Senate version." Opp. Br. at 10 n.8 (emphasis in original). Respondents are in error. Not only did the quoted legislative history address the Senate version of Section 209(b), but its very point was that Congress sought to allocate responsibilities between *only* the federal agency and California. Congress never assigned any role to private opponents, much less imposed the inordinate burden upheld by the court below.

The federal respondents similarly misuse a fragment of legislative history concerning the 1977 amendments to Section 209(b). Prior to 1977 California regulations could be waived only if they were "more stringent" than applicable federal standards. In 1977 Congress amended the section to permit waiver if the California regulations were "as protective" as federal standards so that California could relax federal carbon monoxide standards in a technological "tradeoff" for establishing particularly stringent standards for oxides

of nitrogen. *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301-302 (1977). Citing the explanatory legislative history, respondents argue that California is to have the "broadest possible discretion in establishing regulations designed to mitigate the effects of the State's unique air pollution problems." Opp. Br. at 9. But there is nothing in the legislative history that suggests a congressional intent to relieve the Administrator of his statutory duty affirmatively to protect the federal interests embodied in the Clean Air Act, including air quality.

The federal respondents also suggest that the court below, and the Administrator, addressed petitioners' evidence concerning the effect of the in-use maintenance regulations on air quality, so "[t]here is no occasion for further review of this factual determination." Opp. Br. at 12. But petitioners did not ask the court below, and do not ask this Court, to review factual considerations, but rather to confirm that Section 209(b) requires the Administrator to consider evidence that a waiver will denigrate air quality. Such confirmation is required because, as shown in the petition, the court below tolerated waiver proceedings in which the Administrator stated that he was statutorily prohibited from considering evidence relevant to air quality. Pet. at 16-17. As a result, the waiver stands today even though California conceded that it cannot estimate the potential beneficial effect of the regulations on air quality, EPA conceded that there is evidence of adverse effects on air quality, and the court below conceded that there was "room for disagreement about the potential benefits of the in-use maintenance regulations." Pet. at 17-18. Stated differently, the point is not merely that the Administrator's factual



findings were erroneous, but that his alleged factual inquiry was illusory. Pet. at 16-17. The federal respondents have completely failed to explain just what, if any, factual inquiry the Administrator is required to conduct,[2] and respondents thus apply the last brush strokes to the portrait of the Administrator that has emerged from this case. Unfortunately, that portrait evokes the *Wizard of Oz,* displaying a figure claimed to be of Solomonic grandeur until the curtain is pulled aside and a little man is seen mechanically manipulating levers in preparation for the announcement of a predetermined conclusion—the grant of a waiver.[3]

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[2] The federal respondents attempt to breathe life into the Administrator's role by a semantic game, insisting that the court below defined his " 'task [as] something more than ministerial.' " Opp. Br. at 12, *quoting* slip op., App. at 49a. But the court also specified just what that "something" was. The opinion stated that the Administrator's review is to be "largely ministerial." Slip op., App. at 55a n.56. And, in a companion case, the court stated that his review is to be "cursory." ***Ford Motor Co.*** v. ***EPA,*** 606 F.2d 1293, 1302 (D.C. Cir. 1979).

[3] The federal respondents suggest that "[t]here is no possibility that another Court of Appeals will reach a different interpretation of Section 209, because exclusive review of California waiver decisions rests with the District of Columbia Circuit under Section 307(b) of the Clean Air Act." Opp. Br. at 18 n.16. Respondents misstate Section 307(b), 42 U.S.C. § 7607(b). Judicial review of waiver decisions is in the District of Columbia Circuit only if a waiver is "nationally applicable," as the Administrator determined this waiver to be (incidentally belying the respondents' contention that this case concerns only California, *see* Opp. Br. at 7-8). But some Section 209(b) waivers may be of local or regional impact, in which case review will be in the Ninth Circuit. *See* Section 307(b). When the Ninth Circuit is called upon to consider Section 209(b) proceedings, it should have the guidance of this Court, not that of the opinion below.

**II. Respondents Have Attempted to Disguise the Fact That the Holdings of the Court Below Conflict With *Virginia State Board* and Other Relevant Precedents.**

Petitioners contend that during waiver proceedings the Administrator must consider First Amendment questions, especially since his constitutional inquiry would illuminate subsequent judicial proceedings. In conflict with the principles of relevant precedents, the court below held that the Administrator need not address First Amendment objections. *See* Pet. at 21-22. The federal respondents attempt to deny this conflict by misstating the relevant case law. They claim that *Plano* v. *Baker,* 504 F.2d 595 (2d Cir. 1974), "[corrected] any possible misconceptions . . . that an administrative agency may . . . consider constitutional challenges on the merits." Opp. Br. at 14 n.13. The *Plano* court held, rather, that because of the severely limited factfinding capacity of the agency in question, constitutional issues were not required to be presented to that particular agency even though such exhaustion would be required in other cases. Here the Administrator is the acknowledged federal expert on air pollution and is statutorily empowered to conduct hearings adequate to address the factual issues relevant to First Amendment analysis. He should therefore have considered the constitutional issues.[4]

[4] The federal respondents also misstate the holding of *Midwest Video Corp.* v. *FCC,* 571 F.2d 1025, 1042-1043 (8th Cir. 1978), *aff'd,* 440 U.S. 689 (1979). *See* Opp. Br. at 14 n.13. The court held that the FCC could not assert regulatory jurisdiction over cable broadcasting simply to advance First Amendment interests, whereas here the Administrator has unquestioned regulatory authority over waiver requests and the issue is whether a request should be denied if its approval would result in a violation of First Amendment rights. Similarly, the Seventh Circuit did not "[rule] that federal administrative agencies cannot pass upon the constitutionality of administrative or legislative action" in *Spiegel, Inc.* v. *FTC,* 540 F.2d 287, 294 (7th Cir. 1976). Opp. Br. at 14 n.13. Rather, the court held that the constitutional issue considered by the agency must be addressed on a case-by-case basis, whereas the agency had purported to reach a *per se* constitutional ruling.



On the merits of the First Amendment issue, the federal respondents cite *Banzhaf* v. *FCC,* 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969), to support the lower court's holding that restrictions on communications between automakers and consumers are constitutional if they have "a reasonable basis in a legitimate governmental policy." Slip op., App. at 64a. This holding, however, directly conflicts with the holding in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). The constitutional test announced there is whether the state *needs* its regulations to accomplish a legitimate state interest. *See id.* at 769-70; *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 95 (1977).[5]

[5] The federal respondents suggest that no First Amendment issue exists because, after amendment of the in-use maintenance regulations, "[m]anufacturers are free to recommend any maintenance they deem appropriate." Opp. Br. at 16. Such "freedom," however, does not include the right to inform consumers that manufacturers' warranty obligations are conditioned on performance of all recommended maintenance, as Congress intended. Section 207 (a), (c)(3) of the Clean Air Act, 42 U.S.C. § 7541(a), (c)(3). Moreover, these regulations, hastily amended after litigation commenced, Pet. at 11-12, impede and frustrate communications with consumers by creating powerful incentives for the consumer to disregard mere "recommendations." Pet. at 23-24.

**III. Material Not Available When the Petition Was Filed Underscores the Lower Court's Error in Allowing the Administrator to Disregard Completely Federal Statutory Policies Other Than Air Quality.**

Petitioners Motor and Equipment Manufacturers Association and Automotive Service Industry Association are representatives of the "aftermarket" (businesses that supply parts and services for automobiles in use). They wish to call to the Court's attention a document recently filed by the Bureau of Competition of the Federal Trade Commission (FTC) with the California Air Resources Board (CARB), entitled "Comments Regarding California Automobile Emission Control System Warranty Regulations" (March 31, 1980).[6] The document is of interest because it demonstrates a disagreement within the Federal Government itself concerning whether the Administrator's waiver proceedings may disregard relevant federal statutory policies such as competition, as the court below held. *See* Pet. at 18-21.[7]

The Bureau of Competition comments are addressed to a set of regulations closely related to the in-use maintenance regulations in question here. The in-use maintenance regulations prohibit automobile manufacturers from "requiring" (as a precondition of emissions warranty coverage) the performance of any maintenance except nine discrete items during the first 50,000 miles of vehicle usage, although additional maintenance may be "recommended." Pet. at 6-7,

[6] For the convenience of the Court, 10 copies of this document have been lodged with the Clerk.

[7] The federal respondents devote a scant page of discussion to this issue, a reticence perhaps explained by the disagreement discussed in the text.



11-12. The warranty regulations actually impose the obligation to warrant emissions-related parts against defects during the first 50,000 miles of usage (if the limited "required" maintenance has been performed).

The Bureau of Competition notes that "EPA studies have shown that most vehicles meet federal standards at the time they are produced and, moreover, that emission control devices are 'reasonably durable.'" Comments at 13. "[*I*]*f properly maintained,* [current vehicle models] will meet emission standards," *id.* at 11 (emphasis in original), and "poor maintenance practices by consumers [, not equipment design, are] the chief cause of excessive automobile emissions." *Id.* at 6.[8] As a result, regulations reducing in-use maintenance will probably have adverse air quality results, while also reducing competition in the maintenance aftermarket, to the detriment of consumers and competitors. *E.g., id.* at 8. Dramatically better air quality and competitive results can be achieved by inspection and maintenance (I/M) programs, already in use outside California. Under such programs, cars are inspected annually, and drivers must bring noncomplying vehicles into compliance. The basic premise is that

[8] These EPA findings belie the litigative posture adopted here by the federal respondents, who suggest it is surprising that manufacturer petitioners believe more maintenance is required for vehicles in actual use than is required during certification testing. *See* Opp. Br. at 5 n.5. In other contexts, EPA has recognized the commonsensical—a controlled four-month certification test cannot simulate five years or 50,000 miles of driving under the widely divergent conditions encountered in vehicle usage. The maintenance reasonable during certification testing therefore is not *ipso facto* the maintenance reasonable during vehicle usage.

more, rather than less, maintenance should be performed to benefit air quality. *Id.* at 4-9.

Against this background, the Bureau of Competition expressly rejects the Administrator's complete disregard of relevant federal statutory policies other than air quality, arguing that Section 209(b) requires consideration of both air quality and competition in waiver proceedings. Noting that the FTC had submitted comments emphasizing competitive issues in waiver proceedings, the Bureau states:

> "The FTC [comments were] submitted . . . prior to the court of appeals' ruling [in the instant case]. The Commission relied on the Congressional design in enacting the Clean Air Act Amendments of 1977 'to protect the automotive aftermarket parts and service industry from any potential anticompetitive impacts of the auto emission warranty requirements.' S. Rep. No. 95-127, 95th Cong., 1st Sess. 15 (1977). *See also,* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 291-97 (1977). *Although the statutory waiver criteria do not expressly include antitrust considerations, potential anticompetitive effects could warrant the conclusion that the CARB regulations are 'arbitrary and capricious' or are not necessary 'to meet compelling and extraordinary conditions,' both of which are grounds for denying a Clean Air Act waiver.* 42 U.S.C. § 7543(b)(1)." Comments at 3 n.9 (emphasis added).

The disarray within the Government itself underscores the need for this Court's review—not to resolve the underlying factual issues, but to determine whether the court below erred in allowing the Administrator



to disregard completely relevant federal statutory policies.[9]

### IV. Conclusion

For the reasons stated herein and in the petition, petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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[9] The Bureau's comments also demonstrate that California's regulations do not meet the "need" test established by *Virginia State Board* for permissible restrictions on automakers' First Amendment rights. Restrictions on in-use maintenance simply do not "address the major causes of cars exceeding emission standards—poor maintenance and tampering," and EPA itself "believes the I/M strategy [, not restrictions on maintenance,] offers the most effective solution to these problems." Comments at 7, 14.

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